FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1046

SAN JACINTO JUNIOR COLLEGE, ET AL,
Petitioners,

v.

LECIL HANDER, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION

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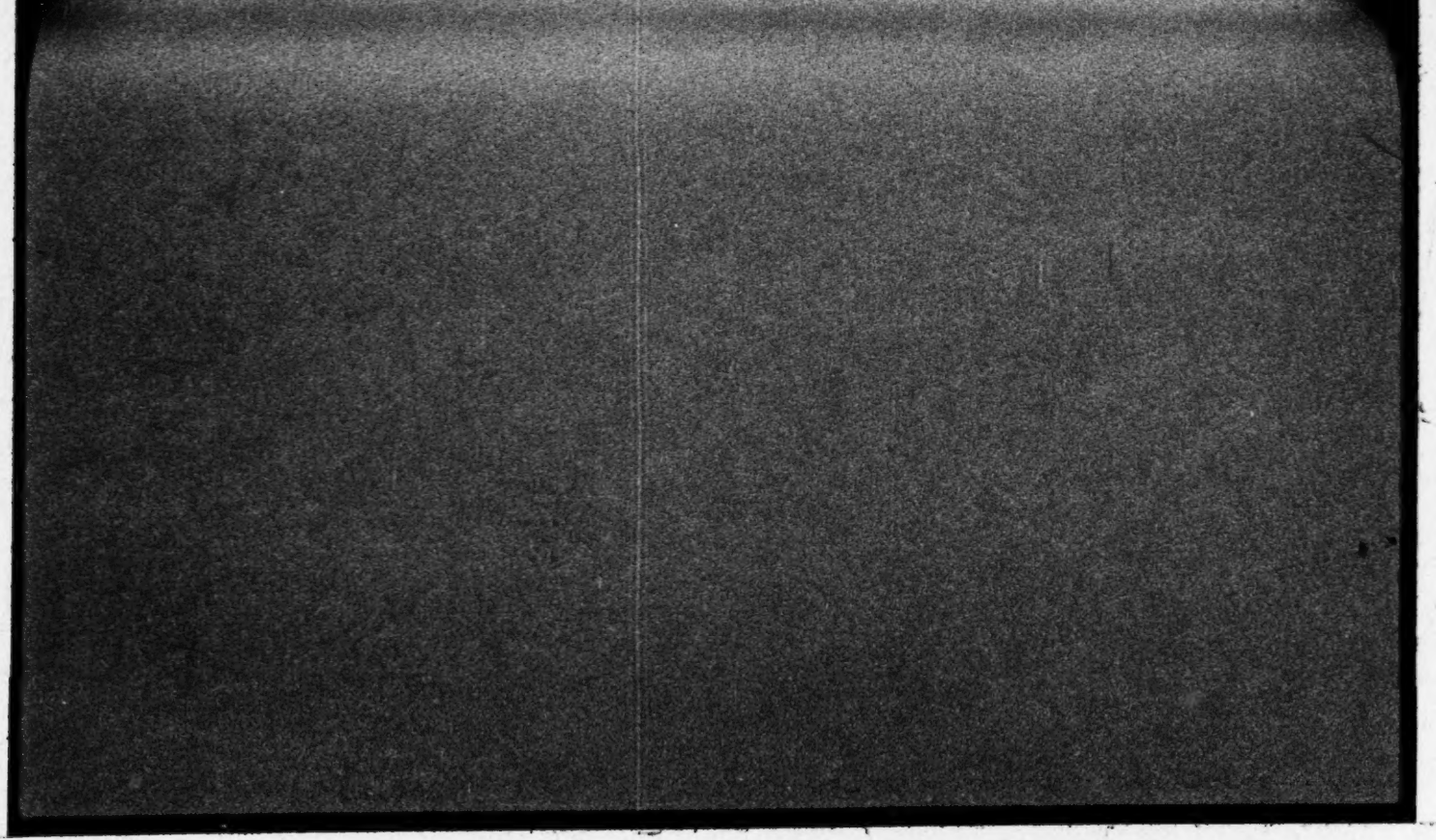

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION

The opinion of the Court of Appeals, 468 F.2d 619, and the opinion of the United States District Court for the Southern District of Texas, 325 F.Supp. 1019 (1971), is appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

1. Whether Federal Courts should abstain in cases involving state college regulations pertaining to the grooming of its employees.

2. Whether the Constitution of the United States or any Federal statute prohibits the adoption of arbitrary and capricious grooming regulations for employees by state colleges and universities.

STATEMENT OF THE CASE

In September, 1969, Lecil Hander, plaintiff-appellant, was hired by defendant-appellee, San Jacinto Junior College, a public junior college of the State of Texas, as a full-time instructor in biology. At that time the College had a written policy prohibiting long hair and beards on male students. This policy was not applicable to the faculty members; however, Mr. Hander as an instructor at the College was "expected to go along" with the student policy.

Then, on November 17, 1969, United States District Judge John Singleton, Jr., enjoined the College from enforcing its student beard policy in the case of *Carlos Calbillo v. San Jacinto Junior College*, 305 F.Supp. 857 (S.D. Tex. 1969). Thereafter, both students and faculty were allowed to grow beards. Mr. Hander grew his beard in the summer of 1970, and taught without incident during the fall semester 1970.

On December 22, 1970, the Board of Regents of the College re-adopted its student beard rule and at the same time adopted its written policy regarding faculty members, which policy read as follows:

> "Faculty members and all other male employees of San Jacnto College are required to be clean shaven, wear reasonable hair styles, and to have no excessively long sideburns."

After Mr. Hander was informed of the new policy, a hearing was held before the Board of Regents on January 14, 1971, on the issue of his beard, the new policy, and his continued employment as a biology instructor at the College. Following the hearing, his employment with the College was terminated, he was paid the remainder of his contractual salary for the school year 1970-71, and suit was instituted on his behalf and on behalf of all other male faculty members and employees of the College, seeking reinstatement for Mr. Hander and an injunction against the College's enforcement of the faculty beard policy.

After the hearing on plaintiff's requested injunctive relief, but before a decision had been reached, Judge Singleton in the *Calbillo* case referred to above, issued the following Order:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARLOS CALBILLO

v.

SAN JACINTO JUNIOR COLLEGE,
to-wit: DR. O. W. MARCOM, et al

CIVIL ACTION NO. 69-H-1012

ORDER CORRECTING CLERICAL ERROR

It appearing to the satisfaction of this court that the signing and entry on December 31, 1970, of an order entitled "Order Dissolving Preliminary Injunction and Dismissing Cause of Action" was a clerical mistake in that said order through inadvertence failed to set amended

regulation of San Jacinto Junior College pertaining to dress and decorum on the part of male students, which amended regulation should have contained no reference to beards or clean-shaven faces for male students.

Accordingly, it is ORDERED that said order of December 31, 1970, be, and the same is hereby, changed so as to include the following:

> "It is further ORDERED, ADJUDGED, and DECREED that the regulations of San Jacinto Junior College pertaining to dress and decorum on the part of male students shall read as follows:
>
> 'Male students at San Jacinto Junior College are required to wear reasonable hair styles and to have no excessively long sideburns.' "

Except as amended herein, said order of December 31, 1970, shall remain in effect as entered.

The clerk of this court is directed to immediately file this Order and to send copies thereof to all counsel of record.

DONE at Houston, Texas, this 25th day of January, 1971.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

This Order was filed on February 9, 1971. Thereafter, on April 9, 1971, United States District Judge, Carl O. Bue, Jr., issued a memorandum opinion in the instant case, in which opinion the Court abstained from deciding the issues presented and dismissing the action.

The United States Court of Appeals for the Fifth Circuit reversed and remanded this action for a decision to be made on the merits. 468 F.2d 619.

ARGUMENT

The decision below can be sustained on the ground that the doctrine of abstention was misapplied in the District Court, and the fact that the circuits are in conflict regarding grooming regulations on students does not constitute an adequate reason for the grant of certiorari.

In the instant case, neither the District Court, nor the Fifth Circuit have ruled on the merits of the respondent's constitutional claim. This case does not involve high school students or a high school setting. Nor does it involve more mature college students. What it does involve is whether a public college may require a 30-year old male biology instructor, who is a husband and father, to wear only college-approved hair styles (not including his neatly trimmed beard) as a condition of his continued employment by the college.

Respondent respectfully submits that the issue in conflict among the circuits in regards to grooming regulations of public school students "can await a day when the issue is posed less abstractly." *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959).

In *Monrosa*, where a Writ of Certiorari was dismissed as evidently granted, this Court recognized that the question which led to the Grant of Certiorari was more or less academic, since the Court of Appeals decision could be sustained on an independent, alternative ground. Mr. Justice Brennan stated:

> "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not singly administrative or managerial. Resolution here of the . . . [issues in conflict] can await the day when the issue is posed less abstractly." 359 U.S. at 184.

This case can be sustained on the ground that the Fifth Circuit correctly reversed and remanded the district court's decision to abstain from deciding Federal constitutional questions. Certiorari should not be granted to review the constitutionality of grooming regulations applicable to public school students when that issue is only abstractly present in the instant case.

In the instant case, the District Court applied the abstention doctrine and refrained from exercising its jurisdiction to decide the Constitutional issue presented on the ground that a state court decision interpreting the general statutory grant of power to junior college boards or regents and interpreting the validity of the College beard policy would foreclose the necessity for a federal court decision on the federal Constitutional question presented. That holding misapplies the abstention doctrine as it has developed in the federal courts since *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643 (1941).

The basis of the doctrine is a sound one. Judicial economy, comity between the federal and state judicial systems, and avoidance of unnecessary federal Constitutional decisions are the more important worthwhile objectives of the doctrine. However, the abstention doctrine was never intended to apply in such a way as to deprive a plaintiff of his federal remedy.

From the *Railroad Commission* case, supra, to the present, the abstention doctrine has been applied "only in narrowly limited 'special circumstances.' " *Zwickler v. Koota*, 389 U.S. 241, 248, 88 S.Ct. 391, 395 (1969). Most often, those special circumstances arise where the plaintiff raises two issues of law, one involving the construction of a state statute or a state Constitutional provision, and the other involving a federal Constitutional problem. In the *Railroad Commission* case, supra, the plaintiffs asserted that both Texas law and the United States Constitution forbade an order of the Railroad Commission regulating the presence of conductors on passenger train sleeping cars. This Court held that the Constitutional questions raised by the plaintiffs should not be passed on by the federal courts until the validity of the order was reviewed in the Texas state courts under the applicable Texas statute. "If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the Constitutional issue does not arise." 312 U.S. at 501. Again, in *Reetz v. Bozanich*, 397 U.S. 82, 90 S.Ct. 788 (1970), the plaintiffs raised issues of state law as well as federal Constitutional questions relating to newly adopted Alaska fishing rights statutes. This Court held that the abstention doctrine should only be applied "Where the issue of state law is uncertain. . . . A state court decision here, however, could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship." 397 U.S. at 86-87.

The common thread running through these opinions is that (a) where a plaintiff raises both a state claim and a federal Constitutional claim in federal court, (b) where

the issue of state law is uncertain, (c) where a state court construction favorable to the plaintiff could avoid the federal Constitutional question, and (d) where the federal court would otherwise be in a position of construing a state issue in advance of an authoritative ruling by a state court, then the federal court should abstain from deciding either of the issues since (e) the federal court decision on the state issue could irritate the federal-state relationship, and (f) the federal court decision on the Constitutional issue could be an unnecessary one.

Neither the policy considerations underlying the abstention doctrine nor the case law applying it justified the application of the doctrine to the instant case. Plaintiff-appellant, Lecil Hander, in his complaint and in the District Court proceedings has never contended that the College beard policy was in violation of state law or the state Constitution. It is the defendants-appellees who have raised the question, placing themselves in the unusual position of alleging a possible violation of state law by the College: "Thus it is conceivable that the state courts themselves would strike the college's rule." Plaintiff-appellant has not asked the District Court to pass on any issue of state law, and therefore there could be no possible irritant in the federal-state relationship. *Reetz v. Bozanich,* supra.

Second, there is nothing on the face of the College's beard policy, the state laws relating to public junior colleges, or provisions of the state Constitution which indicate that a state court interpretation would avoid or modify the federal Constitutional question. The provision of the Texas Constitution relied on by the District Court as the basis for the College beard policy states simply that:

> "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

Texas Constitution, Art. VII, sec. 1. The Texas Education Code provides only that:

> "A union junior college, a county junior college, or a joint-county junior college shall be governed, administered, and controlled by and under the direction of a board of trustees of seven members."

Tex. Ed. Code, sec. 51.040. Both are general grants of power to regulate public schools. The District Court then declared it to be an unsettled question of state law whether the College could pass the beard policy it did pursuant to this general grant of power for the control and operation of a junior college.

Such reasoning does not follow the tests necessary before a federal court should abstain from deciding the merits of a plaintiff's Constitutional claim. In *Zwickler v. Koota,* supra, this Court quoted with approval the following language from *United States v. Livingston,* 179 F.Supp. 9, 12-13 (D.C.), aff'd *Livingston v. United States,* 364 U.S. 281, 80 S.Ct. 1611 (1960):

> "Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal Constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit."

389 U.S. at 251, 88 S.Ct. at 397. Respondent respectfully contends that the Texas statutory and Constitutional provisions are of such a general nature that they are not "fairly subject to an interpretation which will avoid or modify the federal Constitutional question." This would necessarily mean an interpretation favorable to the plaintiff; otherwise, the federal Constitutional issue would remain were the state issue resolved against the plaintiff, and attendant expense and delay would have occurred in the meantime. As an example of the difficulties a plaintiff may find himself in where the federal court and not the plaintiff has raised the state issue, and then abstains, see *England v. Louisiana State Bd. of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461 (1964).

Besides, the extent to which public school district regulations such as the one in question here are sustainable is not an unsettled question of Texas Law. Quite to the contrary, it is well settled in Texas that a school regulation is sustainable if there is any reasonable relationship between the regulation in question and the proper operation of the school. See *Passel v. Fort Worth Independent School District,* 453 S.W.2d 888 (Tex. Civ. App. 1970), ref. n.r.e.; *McLean Independent School District v. Andrews,* 333 S.W.2d 886 (Tex. Civ. App. 1960); *Kissick v. Garland Independent School District,* 330 S.W.2d 708 (Tex. Civ. App. 1960), ref. n.r.e.; *Romeike v. Houston Independent School District,* 368 S.W.2d 895 (Tex. Civ. App. 1963). See also *Ferrell v. Dallas Ind. Sch. Dist.,* 392 F.2d 697, 701-702 (C.A. 5, 1968).

Additionally, the District Court in applying the abstention doctrine to the instant case has overlooked the fact that this is an action brought under the Civil Rights Act of 1871, 42 U.S.C. 1983. In *Monroe v. Pape,* 365 U.S.

167, 81 S.Ct. 473 (1961), this Court reviewed the legislative history and purpose of section 1983 and concluded that:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is involved."

365 U.S. at 183, 81 S.Ct. at 482. This Court reaffirmed their holding in *Monroe* supra, regarding the supplementary nature of section 1983, in *McNeese v. Board of Education*, 373 U.S. 668, 83 S.Ct. 1433 (1963), which held that the plaintiffs did not have to look to state law first regarding their complaint of racial discrimination:

> "We would defeat those purposes [of section 1983] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court."

373 U.S. at 672, 83 S.Ct. at 1436. This Court went on in *McNeese* to distinguish the section 1983 claim from the abstention cases:

> "Nor is the federal right in any way entangled in a skein of state law that must be untangled before the federal case can proceed. For petitioners assert that respondents have been and are depriving them of rights protected by the Fourteenth Amendment. It is immaterial whether respondents' conduct is legal or illegal as a matter of state law."

373 U.S. at 674, 83 S.Ct. at 1437. In the *Zwickler* case, supra, this Court said:

> "In *McNeese v. Board of Education*, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622, we again empha-

> sized that abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim."

389 U.S. at 251, 88 S.Ct. at 397. In a footnote, the Court added:

> "We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is *obviously* susceptible of a limiting construction. [Numerous citations]." (emphasis added).

389 at 251, 88 S.Ct. at 397, fn. 14.

The abstention doctrine, section 1983, and the interrelationship between the two has also been before the Fifth Circuit with great regularity. In *Moreno v. Henckel,* 431 F.2d 1299 (C.A. 5, 1970), the Fifth Circuit exhaustively analyzed the Supreme Court cases cited in the foregoing pages, and concluded that *Monroe,* supra, *McNeese,* supra, and *Zwickler,* supra, controlled their decision in *Moreno.* That case is virtually identical to the instant case, since in *Moreno* the plaintiff was alleging an unlawful discharge from public employment based on his exercise of protected rights under the First and Fourteenth Amendments. The suit was brought under 42 U.S.C. 1983.

What respondent sought in the District Court was determination of the question of whether his dismissal from employment by defendants herein violated the Fourteenth Amendment. If the District Court's decision to abstain is left standing, the resulting effects will be that plaintiff will never have his day in court on the merits of his Constitutional claim; and the path will be cleared for other District Courts to avoid section 1983 claims simply by

searching for general statutory authority on which an interpretation of an existent "state action" might rest, whereupon, an artificial factual or legal distinction between the subject problem and similar state court decisions might be found, "causing" the trial court to hold that the state statute uncovered by the District Court's diligence is unsettled, and, therefore, forcing abstention. Surely the high purposes of the abstention doctrine were never meant to effectively deny a federal decision on a federal Constitutional question.

The Fifth Circuit's reversal of the District Court's decision to abstain is not in conflict with other circuits. The issue of imposing grooming regulations on *students* is only abstractly if at all present in this case, and the conflict in the circuit courts on that issue does not constitute an adequate reason for the grant of certiorari in this case.

CONCLUSION

For the reasons stated above, respondent says that a Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of March, 1973, three copies of the Brief in Opposition were mailed, postage prepaid, certified, return receipt requested, to Mr. B. Jeff Crane, Jr., Attorney at Law, First City National Bank Building, Houston, Texas, 77002, Counsel for the Petitioner.

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